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SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1973

No. 73-930

MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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Petitioner, Maritime Communications Service, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, filed on September 20, 1973.

CONFLICTING OPINIONS.

In compliance with motions by both the respondent and the petitioner, the United States Court of Appeals for the Ninth Circuit transferred this proceeding, without prejudice, to the United States Court of Appeals for the District of Columbia Circuit, see Order on Appendix Exhibit A. However, the transferee court, by way of dismissal, has refused to hear the case, see Order on Appendix Exhibit B.

JURISDICTION.

Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 20, 1973 and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 47 USC §402(j) and 28 USC §1254(1).

QUESTIONS PRESENTED.

1. Whether, if in the interest of justice, a United States Court of Appeals, without subject matter jurisdiction, has power to transfer a timely filed Petition For Review of an Administrative Order if a statute of limitation will prevent another filing in a court with subject matter jurisdiction.

2. Whether the thirty day limit for appealing in the District of Columbia Circuit, as set forth by 47 USC §402 (c), is tolled due to a timely filing in the Ninth Circuit.

STATUTORY PROVISIONS INVOLVED.

1. 47 USC §402 (b).

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia Circuit in any of the following cases:

(1). By any applicant for a construction permit or station license whose application is denied by the Commission.

2. 47 USC §402 (c).

Such appeal shall be taken by filing a notice of appeal with the court within 30 days from the date upon which notice is given of the decision or order complained of.

3. 47 USC §402 (j).

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefore under section 1254 of title 28, by the appellant.

STATEMENT OF THE CASE.

Petitioner, Maritime Communications Service, MCS, is a California partnership composed of two partners, Ronald E. Matteson and Loren R. McQueen. In April of 1968, petitioner applied to the Federal Communications Commission for a Class III public correspondence marine radio station license so as to serve boaters in the general area of

San Francisco, California. A major purpose of this type of station is to allow a boater, by use of the ship's radio equipment, to telephone his residence or office and preferably at a local toll free telephone rate, (FCC Rule 81.3(j) and FCC Docket No. 19360.) Pacific Telephone Company, a subsidiary of Bell Telephone, filed a petition to deny the application of MCS, however, certain company officials made it clear that the petition to deny would be removed if MCS would agree not to serve the San Francisco Bay Area.

Initial Decision FCC 71D-84, released November 9, 1971, concluded that MCS should receive a grant but for the fact that co channel interference would result with an existing station owned by Pacific Telephone Company and located inland at Vacaville, California. Licenses were granted to Western California Telephone Company and Salinas Valley Radio Telephone Company. Coverage area of the proposed station of MCS would have included not only that area served by the two grantees but also the entire San Francisco Bay area.

MCS filed exceptions to the FCC Review Board and MCS concluded that Federal Rules of Evidence and Federal Rules of Procedure would not uphold the finding of co channel interference between the proposed station of MCS and the existing station of Pacific Telephone Company, therefore, the finding of any intereference was arbitrary. MCS further believed that a grant to Western California Telephone Company and Salinas Valley Radio Telephone Company, without a grant to MCS, would fall far short of best serving public interest, convenience

and necessity when considering the basic purpose of this type of station. FCC 72R-311, released November 1, 1972 upheld the Initial Decision and it was again mentioned that co channel interference was the cause for MCS not receiving a grant.

In an Application for the Review Of The Board's Decision, MCS held that it was denied the constitutional right to a fair and impartial hearing. Also, in an Application for the Review Of The Board's Decision, California Senator Alfred E. Alquist, as spokesman for certain named commercial and private boaters, concluded that the decision of the FCC did not best serve public interest, convenience and necessity. The Full Commission in FCC S73-332, released April 3, 1973, upheld the Review Board's decision and by the use of a technicality dismissed the Alquist Application. Pursuant to 47 USC §402 (c), MCS had until May 3, 1973 to appeal the FCC Order, however, on April 17, 1973, or sixteen days before the time limit for appealing had expired, the FCC actually issued licenses to Western California Telephone Company and Salinas Valley Radio Telephone Company.

In this proceeding, the proposed stations, the affected existing stations, and the concerned public boaters were in nexus with the United States Court of Appeals for the Ninth Circuit. In good faith and absolutely without ill intent, MCS construed "may" (see 47 USC §402 (b), *supra*), as being permissive and not mandatory to appeal in the District of Columbia Circuit, therefore, a petition for review of Order was timely filed in the Ninth Circuit on May 2, 1973. After the thirty day

time limit for appealing to the District of Columbia Circuit had expired, respondent FCC moved that the Ninth Circuit either transfer the case to the District of Columbia Circuit or dismiss the case due to the fact that 47 USC §402 (b) placed exclusive subject matter jurisdiction in the District of Columbia Circuit. MCS moved that the Ninth Circuit either entertain jurisdiction or transfer the case. By Order, filed May 31, 1973, see Appendix Exhibit A, the Ninth Circuit transferred this case, without prejudice, to the District of Columbia Circuit.

Motions to dismiss were filed in the District of Columbia Circuit. These motions concluded that the Ninth Circuit was without power to transfer the case and that the thirty day filing limitation had expired before the case was Ordered transferred to the District of Columbia Circuit. By Order, filed September 20, 1973, see Appendix Exhibit B, the District of Columbia Circuit granted the motions to dismiss this case.

REASONS FOR GRANTING THE WRIT.

1. California public policy favors preservation of an action that is filed in a court which lacks subject matter jurisdiction.

"No appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court and proceeded therein as if regularly appealed thereto."

(Wests annotated California Codes, California Constitution Art. 6 §4a p. 88.) (See also *Eldridge v. Richfield Oil Corp.*, 247 F Supp. 408.)

2. United States Legislative intent follows an underlying philosophy that the decisive question in a law suit should focus on the merits and not on esoteric technical problems of procedure.

Being an alternative to the harshness of dismissal, 28 USC §1406 (a), "cure or waiver of defects," is often times broadly construed. In reliance upon legislative intent, it was held that a court had power to effect a valid transfer even when personal jurisdiction was lacking, (*Goldlawr Inc. v. Marcus Heiman*, 8 L Ed. 2d 39.) 28 USC §1406 (c) further enlarged legislative intent by allowing a District Court, without subject matter jurisdiction, to validly transfer the case to a proper Court of Claims, (1960 U.S. Code Cong. and Adm. News, p. 3585.) In reliance upon 28 USC §1406 (a), courts without apparent subject matter jurisdiction have transferred a case so as to preserve the cause of action, (*Peoples Bank & Trust Co. v. Rue*, 210 F Supp. 953; *Ferguson v. Kwik-Chek*, 308 F Supp. 78.) In reference to an applicable statute of limitation, a timely filing displays the dilligence which a statute of limitation is intended to insure, therefore, tolling should be appropriate, (*Goldlawr Inc. v. Marcus Heiman, supra.*) Finally, in *Koehring Company v. Hyde Construction Company, Inc.*, 15 L Ed. 2d 416), it was held that an Appellate Court can transfer a case. In the interest of justice, a United States Court of Appeals should have an inherent jurisdiction so as to

determine jurisdiction and also the accompanying power to effect an enforceable transfer to a proper court.

3. Lacking a Federal transfer law, the United States Court of Appeals for the Ninth Circuit could follow California public policy and validly transfer the case pursuant to 28 USC §1652.

This transfer would adhere to legislative intent and also allow petitioner a day in court so as to be heard on the question of whether there was a fair and impartial Administrative Hearing, (*Aero Design & Engineering Co. v. Oklahoma Employment Security Commission*, 151 F Supp. 844.)

CONCLUSION.

In the interest of justice, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: December 13, 1973.

Respectfully submitted,

RONALD E. MATTESON,
LOREN R. MCQUEEN,

APPENDIX

EXHIBIT A

FILED

MAY 31 1973

DENNIS R. MATHEWS, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents

No. 73-1789

O R D E R

Before: DUNIWAY and TRASK, Circuit Judges

47 U.S.C. § 402(b) vests exclusive jurisdiction over this matter in the United States Court of Appeals for the District of Columbia. It appearing, therefore, that this Court is without jurisdiction in the underlying matter, the motion of petitioner for a stay of certain orders of the Commission pending appeal will be denied without prejudice, and the petition for review of the Order of the Commission denying petitioner a construction permit for a Class III-B transmitter (Docket No. 19,006) will be ordered transferred without prejudice to the Court of Appeals for the District of Columbia.

BEN. C. DUNIWAY

United States Circuit Judges

MoCal 5/29/73

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EXHIBIT B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1642 September Term, 1973

Maritime Communications Service,
Petitioner

v.

Federal Communications Commission,
Respondent

Pacific Telephone and Telegraph Co.
Salinas Valley Radio Telephone Co.
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 20 1973
HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; Tamm and Robinson, Circuit Judges

O R D E R

On consideration of petitioner's motion for stay pending appeal, intervenors' motions to dismiss petition for review and of the responsive pleadings with respect to the foregoing, it is

ORDERED by the Court that the aforesaid motion to dismiss is granted and the petition for review herein is dismissed.

Per Curiam

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